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79-1558

In the Supreme Court of the United States

October Term, 1979

No. 79-

DEWEY EUGENE COLEMAN, PETITIONER

vs.

STATE OF MONTANA, RESPONDENT

PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF MONTANA

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In the Supreme Court of the United States

October Term, 1979

No. 79-

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF MONTANA

Dewey Eugene Coleman petitions for a Writ of Certiorari to review the opinions of the Supreme Court of Montana in this case.

OPINIONS BELOW

The opinions of the Montana Supreme Court are:

A. *State v. Coleman* (First Appeal), ____M.____, 579 P.2d 732 (Decided and Filed July 10, 1978) (Appendix p. 1)

B. *State v. Coleman* (Second Appeal), ____M____, 605 P.2d 1000, (Decided and Filed June 20, 1979) (Appendix p. 36)

C. The opinion denying Coleman's petition for rehearing on his second appeal, ____M.____, 605 P. 2d 1051, (Decided and Filed December 19, 1979) (Appendix p. 123)

D. *State of Montana ex rel. Dewey Eugene Coleman, petitioner, vs. Sentence Review Division of the Supreme Court of Montana*, Order on Application for Writ of Supervisory Control, (unreported) (Decided and Filed March 21, 1980) (Appendix p. 140)

JURISDICTION

The dates of the opinions and order sought to be reviewed and the time of the filing of each are as shown in the preceding paragraph.

Following the Montana Supreme Court's decision on Coleman's second appeal on June 20, 1979, Coleman timely appealed for rehearing, which was granted, and then following the submission of briefs and oral argument thereon was denied on December 19, 1979, as shown in the opinions referred to above.

On timely application for extension of time within which to file petition for certiorari, Mr. Justice Rehnquist, Associate Justice of the Supreme Court of the United States, by his order dated March 11, 1980, extended the time within which Coleman could file for certiorari to and including April 4, 1980.

The jurisdiction of this Court is invoked under the provisions of 28 U.S.C. Section 1257(3).

QUESTIONS PRESENTED FOR REVIEW

1. WHETHER COLEMAN'S DEATH SENTENCE UNDER STATUTES NOT PASSED UNTIL AFTER HIS TRIAL AND CONVICTION VIOLATES EQUAL PROTECTION AND EX POST FACTO RIGHTS?

2. WHETHER DOUBLE JEOPARDY BARS COLEMAN'S DEATH SENTENCE ON AGGRAVATED KIDNAPPING WHICH LED TO THE DEATH OF THE VICTIM, WHEN HE HAD ALREADY BEEN CONVICTED AND SENTENCED FOR DELIBERATE HOMICIDE FOR HIS SAME ACT CAUSING THIS VICTIM'S DEATH AND WHERE AS PLEADED THESE ARE IDENTICAL OFFENSES?

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5. WHETHER THE MONTANA STATUTE UNCONSTITUTIONALLY LIMITS THE MITIGATING FACTORS THAT MAY BE CONSIDERED, PLACES THE BURDEN OF PROOF ON COLEMAN AND IS A MANDATORY DEATH STATUTE?

6. WHETHER THE MONTANA COURTS PROPERLY CONSIDERED SIMILAR CASES?

7. WHETHER COLEMAN WAS UNCONSTITUTIONALLY DEPRIVED OF HIS RIGHT TO PRESENT ARGUMENT AS TO HIS DEATH SENTENCE?

8. WHETHER COLEMAN'S JURY WAS UNCONSTITUTIONALLY INSTRUCTED AS TO THE CRIMINAL INTENT THE STATE HAS THE BURDEN OF PROVING BEYOND A REASONABLE DOUBT?

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves the Fourth, Fifth, Sixth, Eighth and Fourteenth Amendments to the Constitution of the United States, and certain sections of the Montana Code Annotated, as set forth verbatim at Appendix p. 144.

STATEMENT OF THE CASE

Defendant Dewey Eugene Coleman has been resentenced to death for the crime of aggravated kidnapping under a judgment and order entered by the District Court July 10, 1978, and affirmed by the Montana Supreme Court in its decision on his se-

cond appeal, 605 P. 2d 1000 (App. p. 36), and in its decision denying his petition for rehearing, 605 P.2d 1051 (App. p. 123).

Coleman had been convicted by a jury on November 14, 1975 of the crimes of deliberate homicide, aggravated kidnapping, and sexual intercourse without consent. By their decision in the first *Coleman* appeal, 579 P.2d 732 (App. p. 1), the Montana Court there found Coleman's first death sentence to be based upon an unconstitutional mandatory death law and remanded his case to the District Court for resentencing on the aggravated kidnapping charge, and found the sentence imposed on Count III, sexual intercourse without consent, to be also erroneous and to be remanded for resentencing. His judgment of conviction on the deliberate homicide charge and its sentence of 100 years were affirmed.

The District Court on remand set a sentencing hearing in accordance with the provisions of certain new Montana death penalty laws passed after Coleman's trial and conviction, and denied his objections thereto. No evidence was offered by either party at the first hearing set on June 14, 1978, and the court accepted and filed a presentence report.

Thereafter, the court set July 10, 1978 as the date for sentencing, and just prior to that hearing handed counsel for the defendant and the State a copy of its written Findings, Judgment and Order resentencing Coleman to death on the aggravated kidnapping charge and fixing a 20 year sentence on the sexual intercourse without consent charge. When the hearing actually started, the court allowed Coleman's counsel and the State to present argument, although the court's decision had already been made.

The court found that an aggravating circumstance existed because the aggravated kidnapping offense had resulted in the death of the victim and that none of the mitigating circumstances listed by law were sufficiently substantial to call for leniency in his case, and that the only mitigating circumstance technically present was that Coleman had no record history of prior criminal activity. The decision made no reference to the mitigating factors set forth in the presentence report.

Coleman petitioned the District Court to reconsider its decision based on the fact that the court's decision had been made prior to the time that Coleman's counsel was permitted any opportunity

to present oral argument thereon, and because of the recent *Lockett v. Ohio* United States Supreme Court decision, handed down just a week prior to Coleman's sentencing, but this was denied. Coleman then appealed to the Montana Supreme Court, which was denied, 605 P.2d 1000, Coleman timely petitioned for rehearing, which was granted, but following the submission of further briefs and oral argument thereon, the Montana Supreme Court then denied his petition for rehearing, 605 P. 2d 1051.

Each question presented here for review was also presented to the Montana Supreme Court during Coleman's First and Second Appeals and in his Petition for Rehearing and were there denied by that Court.

STATEMENT OF THE FACTS

Coleman and Robert Dennis Nank, who was originally also charged with the same identical three-count information as was filed against Coleman, were travelling together by motorcycle on July 4, 1974, from Roundup, Montana toward Forsyth, Montana on U. S. Highway #12 and ran out of gas. At approximately that same time, Peggy Lee Harstad disappeared while driving on such same highway. On August 29, 1974, her body was discovered just west of Forsyth, Montana on the north side of the Yellowstone River. A pathologist found no physical evidence as to rape, or injury to her body, and was not able to determine the cause of death.

Coleman and Nank told opposite statements of fact as to what happened. Other than Nank's testimony, there was no direct or circumstantial evidence as to the then different facts. Every piece of evidence relied on by the State to corroborate Nank equally corroborated and was consistent with Coleman's testimony. Nank testified that Coleman and he had discussed hitch-hiking, and taking over the car and driver that stopped and possibly killing the driver. After stating that one car had stopped, but that the man and woman in it kept their doors locked, the man had his foot on the gas and refused to give them a ride, offering to send help back, Nank said that the girl stopped in her car and gave them a ride. Nank, sitting next to the girl, while driving down the highway, then reached over and turned the key off, steered the

car to a stop at the side of the road, and said that Coleman then got into the driver's seat and drove back to where their motorcycle was out of gas. Nank said that he put the girl in the back seat of the car, took her clothes off, tied her hands together with a rope, and attempted to rape her, failing because of his lack of an erection.

Nank testified that Coleman then removed his clothes and had intercourse with her in the back seat. Nank did not testify as to any facts showing any violence or bodily injury inflicted upon her or struggle by her at this time. Nank, who testified at length as to his foot fetish, said that he held her foot during this time. After then driving through Forsyth and to the Rosebud overpass, Nank testified that he then drove the car back through Forsyth, across the bridge on U. S. Highway #12 where he made a right turn down toward a railroad embankment. Nank said that he then dressed the girl, and took her out of the car, with her hands tied, and led her down to the river. At that place, Nank testified that Coleman hit her on the head with his helmet, that Coleman attempted to strangle her with a rope, and that Nank tried briefly to strangle her, but that she was then still alive. Nank then testified that the two of them placed her in the river, where Coleman held her feet and Nank held her head under water until she drowned.

Nank then testified that they drove her car back through Forsyth in an easterly direction until it ran out of gas. They then removed certain items from the car and walked back to Forsyth.

From this point, both Nank's and Coleman's statements as to what happened were basically the same. This included that Nank left Coleman in Forsyth, hitchhiked a ride back to where the motorcycle was, with gas, brought the motorcycle back to Forsyth, picked up Coleman, and that they then drove east, and then returned back to Forsyth and proceeded south to Sheridan, Wyoming to the Veterans Hospital there.

After being interviewed both by officials from the Sheriff's Department and the F.B.I. at the Hospital, Nank and Coleman left that hospital and went to Boise, Idaho where they obtained an apartment and where they were living at the time of their arrest.

Coleman testified that after their motorcycle ran out of gas and the one couple refused to give them a ride or let them in the car, that Nank told him that there were not many black people in this area so they would have a hard time catching a ride together, and that Coleman should stay and protect the motorcycle while he caught a ride. Coleman said that while he was sitting off the highway smoking, a car did stop and pick up Nank, but he did not see or know who the driver was. Coleman testified that after several hours, Nank then returned in a car, that he was wet and upset and acted very strange, told Coleman to get their things off the motorcycle and go with him in the car, that they then drove past Forsyth where Nank said he had to pick up something. They then stopped, Nank picked up a blanket and they then headed back to Forsyth. At that time, Nank advised Coleman that he had killed a woman and did not describe the details. The car then ran out of gas, Nank took something out of the car and hid it in a field near that area and gave Coleman a purse to carry. As they were walking back to Forsyth, Nank told Coleman to get rid of the purse, and so he threw it into a culvert. When they got back to Forsyth, Nank then again left Coleman there while he hitchhiked with some gas back to the motorcycle and then returned to pick up Coleman. Coleman then testified that Nank threatened him if he ever told these facts to anyone concerning what had happened that night.

Nank's testimony on this is shown beginning at Vol. IV of the transcript at page 796, and concluding at page 1267 of Vol. VI. Coleman's testimony is shown beginning at Vol. X, page 2373, and concluding in the transcript at Vol. XI, page 2541. Coleman also testified on rebuttal, Tr. Vol. XI, page 2600 and 2601. These facts are also set forth by the Montana Court in its first decision at 579 P. 2d p. 738 (App. p. 1)

DENIAL OF SENTENCE REVIEW

Without having had any notice as to or any hearing thereon, and without any right to present his facts, evidence, and law supporting his right to sentence review, the Sentence Review Division and the Montana Supreme Court on March 21, 1980 have

denied Coleman this right. (App. p. 140). Montana has a statutory procedure allowing review of sentences by the Sentence Review Division of the Supreme Court of Montana, which is made up of three district court judges appointed by the Supreme Court. 46-18-901 through 905, MCA 1979.

In supporting his right to sentence review in his March 6, 1980 application for a writ of supervisory control to the Montana Supreme Court, Coleman advanced legitimate reasons why he was entitled to this, including:

(1) that his two prison sentences on deliberate homicide and sexual intercourse without consent are clearly subject to sentence review (admitted by the Montana Supreme Court, but put off until and if Coleman is not hung), (2) that following his sentencing the State then advised him that he was entitled to sentence review by personally delivering to him an application to be used therefor, which Coleman relied on, (3) that the Montana statute in effect at the time of Coleman's conviction (95-2211, RCM, 1947, "Every sentence shall be subject to review . . .") although since repealed, then gave him the right to sentence review, (4) that another defendant convicted of a capital crime, Duncan Peder McKenzie, was granted the right to sentence review (581 P.2d 1227), and (5) that he has not yet had his constitutional due process rights to a full and proper appellate review of similar cases. It is Coleman's position that he has a constitutional due process right to a hearing on these issues before the Sentence Review Division of the Supreme Court of Montana and before the Montana Supreme Court before it rules against him.

Coleman will file a separate Petition for Certiorari to this Court on this March 21, 1980 decision, and as was done by McKenzie.

ARGUMENT

1. WHETHER COLEMAN'S DEATH SENTENCE UNDER STATUTES NOT PASSED UNTIL AFTER HIS TRIAL AND CONVICTION VIOLATES EQUAL PROTECTION AND EX POST FACTO RIGHTS?

Coleman was resentenced to hang on July 10, 1978 under new statutes which were not in effect at the time of his crime, and were not in effect at the time of his trial and conviction.

The aggravated kidnapping crime here took place on July 4, 1974. The jury returned its verdict of guilt on November 14, 1975. Coleman's first hanging sentence on this charge was reversed by the Montana Supreme Court on his first appeal as imposed under an unconstitutional mandatory death penalty statute. The Montana Legislature then passed new death penalty laws, 46-18-301 through 310, MCA 1979, set forth in full at Appendix p. 144, which became effective July 1, 1977, and which were on July 10, 1978 used to sentence him to hang.

Dobbert v. Florida, 432 U.S. 282, 53 L.Ed.2d 344, 97 S.Ct. 2290, relied on by the court below to overcome these constitutional objections actually supports Coleman, as all those defendants in Florida who were convicted prior to the effective date of the new Florida death laws had their sentence commuted to life sentences. Dobbert was *retried* and *convicted* and sentenced under the new Florida death statutes then in effect.

> "After our Furman decision and its own decision in Donaldson v. Sack, the Florida Supreme Court resentenced all prisoners under sentence of death pursuant to the old statute to life imprisonment. Anderson v. State, 267 So 2d 8 (1972); In re Baker, 267 So 2d 331 (1972). Petitioner argues that since his crimes were committed before our decision in Furman, the imposition of the death sentence upon him pursuant to the new statute which was in effect at the time of his trial denies him equal protection of the laws.
>
> But petitioner is simply not similarly situated to those whose sentences were commuted. He was neither tried nor sentenced prior to Furman, as were they, and the only effect of the former statute was to provide sufficient warning of the gravity Florida attached to first-degree murder so as to make the application of this new statute to him consistent with

> the Ex Post Facto Clause of the United States Constitution. Florida obviously had to draw the line at some point between those whose cases had progressed sufficiently far in the legal process so as to be governed solely by the old statute, with the concomitant unconstitutionality of its death penalty provision, and those whose cases involved acts which could properly subject them to punishment under the new statute. There is nothing irrational about Florida's decision to relegate petitioner to the latter class, since the new statute was in effect at the time of his trial and sentence." (432 U.S. 301)

Then *Dobbert* relied upon notice that the death penalty may apply from the Florida unconstitutional death act, while Montana law held that an unconstitutional law was void and not a law in any way. In *Ex parte Anderson,* 125 Mont. 331, 238 P.2d 910, the Montana Supreme Court said:

> " 'An unconstitutional law is void, and is as no law. An offense created by it is not a crime. A conviction under it is not merely erroneous, but is illegal and void, and cannot be a legal cause of imprisonment.' Ex parte Sibold, 100 U.S. 371, 376, 25 L.Ed. 717."

In *State v. District Court,* 130 Mont. 103, 295 P.2d 1042, it was held:

> " 'An unconstitutional state is void, and a void thing is nothing. A void statute is not a law. It imposes no duty, confers no authority, affords no protection, and no one is bound to observe it. In contemplation of law it is inoperative as though it had never been passed.' "

So in ruling that "At the time the crime was committed the statutes were clear that the penalty of death was a very probable consequence of the crime" in its second appeal decision (605 P.2d 1014) (App. p. 51), the Montana Supreme Court erred. Probably the controlling factor was the prefacing statement by the Montana court to this holding that: "There are 'hard facts' present in this appeal which this Court must consider in making its determination." 605 P.2d 1013 (App. p. 51).

Then Montana has a statute as to the construction of its laws, 1-2-109, MCA 1979:

> "No law contained in any of the Codes or other statutes of Montana is retroactive unless expressly so declared."

Even though the records of the committees considering the new death penalty laws in the 1977 Legislature disclose that the committees were there advised in writing by reports submitted that the then existing death law for this particular crime was unconstitutional, and the Legislature then enacted the new death laws under which Coleman was sentenced to hang, these new death laws did not expressly declare that they were to be retroactive.

In *State v. Rhodes,* ____Mont.____, 425 P.2d 1095, and based on *Furman v. Georgia,* 408 U.S. 238, 92 S.Ct. 2726, 33 L.Ed.2d 346, the Montana Supreme Court held the then Montana death statute unconstitutional as to the two defendants there involved, reversed the death sentences there imposed, and modified the judgments "by imposing sentences on each of the defendants of imprisonment in the Montana State Prison for the term of his natural life." This happened even though the Legislature had by then replaced the death penalty statutes with new statutes.

> "Subsequently the legislature enacted into law a mandatory death penalty. We emphasize here that this holding does not in any way purport to rule on the validity of the new statute, passed as Sec. 2, Chapter 262, Laws of 1974 (Section 94-5-105, RCM, 1947, as amended)."

Then the death sentence of a Robert Close, likewise convicted of aggravated kidnapping which led to the death of the victim, was on appeal when the Montana Court ruled his first death penalty unconstitutional. His appeal was dismissed by agreement and he was resentenced to the Montana State Prison.

Coleman contends that the actions of the Montana Supreme Court in his case violates equal protection and fundamental due process of law when compared to *Rhodes, Shields* and *Close.*

Since *Dobbert,* the highest courts of many other states have held contrary to the Montana Supreme Court in *Coleman,* and have refused to uphold a death sentence imposed under a law not in effect at the time of the conviction. See *People v. Payne,* 75 C.A.3d 601, 142 Cal. Rptr. 320 (1977); *People v. Harvey,* 76 C.A.3d 441, 142 Cal. Rptr. 887 (1978); *Miller v. State,* (Tenn. 1979) 584 S.W.2d 758; *State v. Collins,* (La. 1979) 370 So.2d 533; *State v. Rogers,* 270 S.C. 285, 242 S.E.2d 215 (1978); *Lee v. State,* 340 So.2d 474 (1976); *State v. Lindquist,* 99 Idaho 766, 589 P.2d 101; and *People v. Terron,* 23 Cal. 3d 103, 151 Cal. Rptr. 633, 588 P.2d 773, and this conflict should be resolved.

In *Rabe v. Washington,* 405 U.S. 313, the conviction was reversed where made "under a statute with a meaning quite different from the one he was charged with violating." Coleman's sentence to hang was based on a trial and facts heard there by the sentencing judge at the time when Montana then had in effect its later held unconstitutional mandatory death law and no one then acted under any apprehension that these trial facts would later be support to hang him under the new and later passed statutory standards.

2. WHETHER DOUBLE JEOPARDY BARS COLEMAN'S DEATH SENTENCE ON AGGRAVATED KIDNAPPING WHICH LEAD TO THE DEATH OF THE VICTIM, WHEN HE HAD ALREADY BEEN CONVICTED AND SENTENCED FOR DELIBERATE HOMICIDE FOR HIS SAME ACT CAUSING THIS VICTIM'S DEATH AND WHERE AS PLEADED THESE ARE IDENTICAL OFFENSES?

Double Jeopardy bars Coleman's conviction and death sentence for aggravated kidnapping as he had already been convicted on and received the maximum sentence by law for his one single act of causing this victim's death in his deliberate homicide conviction and he can not constitutionally be punished twice for this one act. As pleaded in the information, his conviction on aggravated kidnapping is likewise barred as the provisions of deliberate homicide and aggravated kidnapping did not each require proof of a fact which the other did not.

By Count I of the information, Coleman was charged with deliberate homicide, convicted and received the maximum sentence permitted by law for that crime of 100 years in the Montana State Prison. Although certain statutorily listed aggravated circumstances can permit the death penalty for the crime of deliberate homicide, 46-18-303, MCA 1979, none of these aggravating circumstances were present in this case, and so it was not possible in any event for Coleman to be sentenced to die on his conviction of this crime.

By Count II of the information, Coleman was charged with the crime of aggravated kidnapping, which was amended by the court's own motion to also include the allegation that this kidnapping led to the death of the victim. The jury first returned its verdict of guilt as to deliberate homicide, and then found a verdict of guilt as to the aggravated kidnapping, plus the jury's factual verdict that this kidnapping led to the death of the victim. Coleman's first hanging sentence was reversed by the Montana Supreme Court on his first appeal as the then death statute providing for such hanging was ruled unconstitutional. 579 P.2d 742. (App. p. 9). So when Coleman then faced resentencing on this conviction of aggravated kidnapping, he had then been previously convicted of deliberate homicide, received the maximum sentence provided by law therefor, and both had been affirmed on appeal to the Montana Supreme Court and were final. He had been punished to the maximum extent of the law for his act causing the death of this victim. But then, because his aggravated kidnapping crime led to his same act causing the death of this victim, Coleman was then sentenced to hang therefor. Causing the death of the victim is the only act providing an aggravating circumstance that can allow the death penalty for this crime. 46-18-303(7), MCA 1979.

Ex parte Lange (N.Y. 1874), 85 U.S. 170, 18 Wall 170, 21 L.Ed. 872, holds that it is very clearly the spirit of the double jeopardy constitutional clause to prevent a second punishment under judicial proceedings for the same crime. Coleman agrees that it

would be possible under the statute for him to be convicted and punished for both deliberate homicide and for aggravated kidnapping, but when the State here used the same identical act on which his deliberate homicide was based and for which he was punished, that is causing the death of the victim, and uses that same identical act to enhance his punishment for aggravated kidnapping, and to use that same act to hang him for causing the death of the victim, then this violates his constitutional right to not be placed in double jeopardy as to his punishment.

In defining this right in *North Carolina v. Pearce*, 395 U.S. 711, 23 L.Ed.2d 656, 89 S.Ct. 2072, this Court said:

> "And it protects against multiple punishments for the same offense. ... The Court stated the controlling constitutional principle almost 100 years ago, in the landmark case of Ex parte Lange, 18 Wall 163, 168, 21 L.Ed. 872, 876.
>
> 'If there is anything settled in the jurisprudence of England and America, it is that no man can be twice lawfully punished for the same offence. And . . . there has never been any doubt of (this rule's) entire and complete protection of the party when a second punishment is proposed in the same court, on the same facts, for the same statutory offence.
>
> " '. . . (T)he Constitution was designed as much to prevent the criminal from being twice punished for the same offence as from being twice tried for it.' Id., at 173, 21 L Ed at 878."

U. S. v. Wilson, 420 U.S. 332, 43 L.Ed.2d 232, 95 S.Ct. 1013, cited *Pearce* in its rule that the double jeopardy clause protects against "multiple punishments for the same offense."

Crain v. U.S., 162 U.S. 625, 40 L.Ed. 1097, 16 S.Ct. 952, holds that a judgment in a criminal cause on a verdict of guilty on any count "will be a bar to any further prosecution in respect of any of the matters embraced by it."

There is inconsistency in these statutes which did not allow Coleman to be hung for deliberately killing this victim and do allow this for a lesser crime of kidnapping. There is an explana-

tion which is that these penalty provisions for aggravated kidnapping, 45-5-303(2), MCA 1979, call for a maximum sentence of ten years if the victim is released alive and unhurt and a maximum of death if the kidnapping leads to the victim's death, a commendable statute for use in any bargaining with kidnappers holding hostages. However, here the statute has been used to violate Coleman's right not to be punished twice for his one single act.

This point can be illustrated by an extreme example. Suppose Coleman's death penalty is reversed as unconstitutional but the state prosecutors are still determined to hang him. They convince the legislature to pass a new law that the felony of stealing an automobile when the owner is in it is a capital crime if that theft leads to the death of the victim. As per the Montana Supreme Court this would not be ex post facto or retrospective if the death provisions could be "less onerous" or "ameliorative" or "procedural" and so that court could again approve Coleman's hanging. Coleman contends this would constitute double jeopardy.

Then double jeopardy applies here where the provisions of each crime, as pleaded, did not require proof of a fact which the other did not. This came true after the trial court, over his objection and of its own motion, amended the aggravated kidnapping charge to add the clause that it led to the death of the victim.

We quote the complete charging clauses of Count I, deliberate homicide, with those from Count II, aggravated kidnapping, side by side as taken from the amended information shown in full at Appendix page 143:

"Count I: Deliberate Homicide"	= "Count II: Aggravated Kidnapping
"defendant purposely and knowingly"	= "defendant knowingly and purposely"
"caused the death of another human being, to wit: Peggy Lee Harstad"	= "the alleged actions of the defendant resulted in the death of Peggy Lee Harstad"

"while engaged in the commission of the following felonies: kidnapping and sexual intercourse without consent"	= "without lawful authority restrained her in a place of isolation and by use of physical force to facilitate the commission of a felony, to-wit: sexual intercourse without consent"
"involving the use of physical force and violence against the said Peggy Lee Harstad"	= "for the purpose of inflicting bodily injury on and terrorizing the said victim"

There just is no provision in Count I that is not also included in Count II and the contrary is likewise true.

This violates *Brown v. Ohio*, 432 U.S. 161, 53 L.Ed.2d 187, 97 S.Ct. 2221:

> " 'The applicable rule is that where the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or only one, is whether each provision requires proof of a fact which the other does not. . .' "

The Montana Supreme Court was simply in error in its holding that:

> "Count I, in addition, required proof of the death of the victim which Count II did not; and Count II required proof of a purpose to inflict bodily injury and terrorize the victim which Count I did not." (605 P.2d 1009) (App. p. 42)

Possibly that court was referring to the original information, which prior to the trial court's own amendment did not require proof that Coleman caused the death of the victim. As to its holding that only "Count II required proof of a purpose", it is clear that every element of both Count I and Count II required proof that Coleman acted both "purposely and knowingly".

3. WHETHER THE SELF-EXCUSAL PROCESS USED IN SELECTING HIS JURY PANEL DEPRIVED COLEMAN OF HIS SIXTH AMENDMENT RIGHT TO AN IMPARTIAL JURY PICKED AT RANDOM FROM A FAIR CROSS SECTION OF THE COMMUNITY?

Out of 200 names drawn for his jury panel, only those 61 jurors were summoned who agreed to serve, and the rest were allowed to excuse themselves from serving. An impartial jury must include both persons who do and those who do not want to serve.

Coleman moved successfully to discharge the jury panel first drawn to hear his trial then set for October 20, 1975. A new panel was ordered drawn to report for his trial which was then continued for just three days and until October 23, 1975.

Coleman again moved that this second jury panel be discharged and supported this by the filed affidavit and testimony of Charles J. Pemble, Chief Deputy Clerk of the District Court, who was placed in charge of the selection of such jury panel, who said:

> "As directed by such Judges, this Office then checked addresses and phone numbers of such 200 jurors drawn and corrected these addresses where necessary and then telephoned as many of such 200 jurors as could be reached by telephone, asking each one if they could be available for jury duty on October 23, 1975. Out of all those telephoned, 61 replied that they could be available and these 61 were requested by telephone to come to the Courthouse at Billings, Yellowstone County, Montana on October 23, 1975 to serve on this jury panel. No jury questionnaires were given to these people."

Coleman's objections to this second jury panel included his challenge to the procedure used by such clerk in securing the 61 jurors who reported for duty. Although Montana statutes provide for the drawing of these names at random, and excusal only by the court, 25-7-206(2), MCA 1979, this procedure was not followed. More than one-half of such jury panel were allowed to excuse themselves, without any legal excuse therefor, other than

that they were nct available on such short notice, violating Coleman's constitutional right to an impartial jury selected at random from a fair cross section of the community.

In holding that "juries must be drawn from a source fairly representative of the community", this Court in *Taylor v. Louisiana*, 419 U.S. 522, 42 L.Ed.2d 690, 95 S.Ct. 692 (1975), explained that:

> "jury wheels, pools of names, panels, or venires from which juries are drawn must not systematically exclude distinctive groups in the community and thereby fail to be reasonably representative thereof."

In *Duren v. Missouri*, 439 U.S. 357, 58 L.Ed.2d 579, 99 S.Ct. 664 (1979), it was held that the Missouri statute's exemption of women from jury service on request violated the defendant's rights as guaranteed by the Sixth and Fourteenth Amendments in failing to insure that jurors in criminal cases were drawn from a fair cross section of the community. So this Court has held unconstitutional in *Taylor* a system where a woman could not serve on a jury unless she filed a written declaration of her willingness to do so, and in *Duren* a system which provided an automatic exemption from jury service for any woman requesting not to serve.

Justic Shea dissented on Coleman's first appeal on these grounds and would have ordered a new trial. (579 P.2d 754) (App. p. 31)

4. WHETHER THE MONTANA DEATH STATUTES VIOLATE THE SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS IN DENYING COLEMAN HIS RIGHT TO A JURY VERDICT AS TO THE EXISTENCE OF MITIGATING CIRCUMSTANCES, AND THE APPROPRIATENESS OF HIS DEATH PENALTY?

This question was not decided by this Court when it reversed the death sentence in *Lockett v. Ohio*, 438 U.S. 586, 57 L.Ed.2d 973, 98 S.Ct. 2954.

In view of the "awesome finality of a capital case" (*Kinsella v. Singleton*, 361 U.S. 234, 249, 255 (1960) dissenting and concurring opinion of Mr. Justice Harlan), American jurisdictions had,

prior to *Furman*, determined with near unanimity that the death penalty should be put in the hands of the jury rather than the judge. Indeed, "(e)xcept for our states that entirely abolished capital punishment in the middle of the last century, every American jurisdiction has at some time authorized jury sentencing in capital cases." *McGautha v. California*, 402 U.S. 183, 200 n. 11 (1971).

This Court has now held that "*McGautha's*" assumption that it is not possible to devise standards to guide and regularize jury sentencing in capital cases has been undermined by subsequent experience." *Gregg v. Georgia*, 428 U.S. 153 at 196 n. 47 (plurality opinion). This Court has reaffirmed the desirability of jury input in the capital sentencing process, *id.* at 190; *Proffitt v. Florida*, 428 U.S. 242 at 252; and it has struck down the death penalty laws of three states for their failure to provide a "meaningful opportunity for consideration of mitigating factors presented by the circumstances of the particular crime or by the attributes of the individual offender." *Stanislaus Roberts v. Louisiana*, 428 U.S. 325 at 333-334.

In upholding the Florida post-*Furman* death penalty statute in *Proffitt*, this Court approved only the most limited encroachment upon the tradition that juries rather than judges must speak to the question of life or death.

Although it may be permissible to permit a sentencing judge to review a jury sentence determined under the influence of passion or prejudice, or against the weight of the relevant aggravating and mitigating evidence, the imposition of the death penalty under Coleman's procedure which afforded no opportunity for meaningful jury input cannot be squared with the Sixth, Eighth and Fourteenth Amendments.

"The magnitude of a decision to take a human life is probably unparalleled in the human experience of a member of a civilized society." *Marion v. Beto*, 434 F.2d 29, 32 (CA5 1970). Jury participation in such a decision represents a "principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental", *Snyder v. Massachusetts*, 291 U.S. 97, 104 (1934). Because "the action of the sovereign in taking the life of one of its citizens. . .differs dramatically from any other legiti-

mate state action", *Gardner v. Florida*, 430 U.S. 349, 51 L.Ed.2d 393, 402 (1977) (plurality opinion), it is vitally important that the death-sentencing decision neither be nor appear to be made in an arbitrary or capricious manner. *Gregg v. Georgia, supra; Gardner v. Florida, supra; Furman v. Georgia*, 408 U.S. 238. Death sentencing by a restricted corps of legal professionals, and particularly by one of their number sitting as the sole judge of life or death, presents an aspect and a danger of arbitrariness to which American history has responded by the all-but-ubiquitous involvement of lay juries in the sentencing process - a "likelihood of arbitrary action that the requirement of jury trial was intended to avoid or alleviate." *Codispoti v. Pennsylvania*, 418 U.S. 506, 515 (1974).

A jury determination is "a significant and reliable objective index of contemporary values. . ." *Gregg v. Georgia, supra*, 428 U.S. at 181 (plurality opinion). At a time when society has rejected "the belief that 'every offense in a like legal category calls for an identical punishment without regard to the past life or habits of a particular offender'," *Stanislaus Roberts v. Louisiana, supra*, 428 U.S. at 333 (plurality opinion), it is the only precise indicator of those standards.

This argument is compelling where aggravating circumstances are built into the definitions of capital crimes. *Stanislaus Roberts v. Louisiana, supra*, 429 U.S. at 334-35 (plurality opinion). So long as the punishment determination is taken out of the hands of the jury, it is no less compelling where - as in Coleman's case, his jury's verdict of conviction plus the finding that it led to the victim's death, triggered his death sentence, subject only to reduction upon a later judicial finding of the absence of a "sufficiently substantial" mitigating factor.

This constitutional problem can be exemplified in this case. First this trial was held under a mandatory death statute, later declared unconstitutional by the Montana Court. The trial judge, on his own motion, amended the information to add the clause that was necessary before a death sentence could be applied. The jury was advised in voir dire by the prosecuting attorney that there was a possibility of a death sentence. The trial judge tried the case under the then mandatory death statute and on conviction then sentenced Coleman to death without any kind of a pre-

sentence investigation and report, and without any argument thereon by Coleman's counsel.

Then even though his first death sentence was reversed, he was remanded for resentencing to the same judge, who then resentenced Coleman to hang under a statute which was not in existence at the time of this crime and at the time of Coleman's trial and conviction.

To further compound this process, the sentencing judge then refused to find the Montana statutory mitigating factor that "the defendant has no significant history of prior criminal activity", 46-18-304(1), MCA 1979, even though the clear record, as set forth in the presentence report filed, was that Coleman had *never ever* either been arrested for or convicted of any crime whatsoever.

In the zeal to hang Coleman, the sentencing court's findings were that this was just a "technical" mitigating factor, and the court set forth the fact that during this trial Coleman's co-defendant testified that earlier the same day of the crimes involved here that Coleman and Nank had entered a home and stolen rifles. This was never corroborated during trial, or afterwards at sentencing by any report that any such crime was ever committed or ever reported anywhere.

Presnell v. Georgia, 439 U.S. 14, 58 L.Ed.2d 207, 99 S.Ct. 235, appears directly in point in its holding at 439 U.S. 16 that:

> "In Cole v. Arkansas, 333 U.S. 196, 92 L.Ed. 644, 68 S.Ct. 514 (1948), petitioners were convicted at trial of one offense but their convictions were affirmed by the Supreme Court of Arkansas on the basis of evidence in the record indicating that they had committed another offense on which the jury had not been instructed. In reversing the convictions, Mr. Justice Black wrote for a unanimous Court:
>
> 'It is as much a violation of due process to send an accused to prison following conviction of a charge on which he was never tried as it would be to convict him upon a charge that was never made. . .' "

Coleman should not be hung only on the uncorroborated testimony of his accomplice, who was testifying based on his plea bargain to save his neck, that Coleman had committed this other crime.

5. WHETHER THE MONTANA DEATH STATUTE UNCONSTITUTIONALLY LIMITS THE MITIGATING FACTORS THAT MAY BE CONSIDERED, PLACES THE BURDEN OF PROOF ON COLEMAN, AND IS A MANDATORY DEATH STATUTE?

Two United States Supreme Court opinions handed down July 3, 1978, *Lockett v. Ohio,* 438 U.S. 586, 57 L. Ed.2d 973, 98 S.Ct. 2954, and *Bell v. Ohio,* 438 U.S. 637, 57 L.Ed.2d 1010, 98 S. Ct. 2977, just one week before Coleman's latest death sentence on July 10, 1978, cited to his sentencing court, invalidate Montana's death laws.

In *Lockett* the plurality opinion states:

> "There is no perfect procedure for deciding in which cases governmental authority should be used to impose death. But a statute that prevents the sentencer in all capital cases from giving independent mitigating weight to aspects of the defendant's character and record and to all circumstances of the offense offered in mitigation creates the risk that the death penalty will be imposed in spite of factors which may call for a less severe penalty.

This quotation from Justice White's dissent sums up this holding:

> "Today the Court holds, again through a plurality, that the sentencer may constitutionally impose the death penalty only as an exercise of his unguided discretion after being presented with all circumstances which the defendant might believe to be conceivably relevant to the appropriateness of the penalty for the individual offender."

Justice Rehnquist's dissent summarizes this opinion as::

> "We are now told, in effect, that in order to impose a death sentence a judge or jury must receive in evidence whatever the defense attorney wishes them to hear."

In *Bell,* the court referred to *Lockett* and stated:

> "Bell contends that the Ohio death penalty

> statute violated his rights under the Eighth and Fourteenth Amendments because it prevented the sentencing judges from considering the particular circumstances of his crime and aspects of his character and record as mitigating factors. For the reasons stated in Part III of our opinion in Lockett v. Ohio, supra, we have concluded that 'the Eighth and Fourteenth Amendments require that the sentencer, in all but the rarest kind of capital case, not be precluded from considering, as a mitigating factor, any aspect of a defendant's character or record and any aspect of the offense that the defendant proffers.' We also concluded that: 'The Ohio death penalty statute does not permit the type of individualized consideration of mitigating factors,' that is required by the Eighth and Fourteenth Amendments. We therefore agree with Bell's contentions."

The Montana statute under the 1977 death penalty clauses, 46-18-305, MCA 1979, in relevant part states:

> ". . .the court. . .*shall* impose a sentence of death if it finds one or more of the aggravating circumstances and finds that there are no mitigating circumstances *sufficiently substantial* to call for leniency." (emphasis supplied)

Although much of *Lockett* and *Bell* is critical of the fact that the Ohio statute limited the mitigating circumstances to just the three there specified, and the Montana statute is broader in listing the mitigating circumstances that may be considered, these decisions render unconstitutional the Montana statute which mandates that the court "shall" impose a mandatory death penalty unless the court "finds that there are no mitigating circumstances *sufficiently substantial* to call for leniency." The statute may not so limit the mitigating factors considered, or impose this standard as to their consideration. This Montana Statute puts the burden of proof on Coleman to establish mitigating circumstances and further limits the sentencing judge's "consideration of relevant mitigating factors" to only those he must first find "sufficiently substantial." He is forbidden a right to give "inde-

pendent mitigating weight" to have "unguided discretion" and is specifically "precluded from considering as a mitigating factor any aspect. . .that the defendant offers."

Such a determination made for such a purpose cannot escape the command of the Constitution that the state which establishes any distinction of preponderant importance in the assessment of criminal culpability must "require the prosecution to establish beyond a reasonable doubt the fact(s) upon which it turns." *Mullaney v. Wilbur,* 421 U.S. 684, 698 (1975). "Because of (the). . . qualitative difference (between the sentence of death and one of life imprisonment), there is a corresponding difference in the need for reliability in the determination that death is the appropriate punishment in a specific case." *Woodson v. North Carolina,* 428 U.S. at 305 (plurality opinion). "The reasonable-doubt standard. . .is a prime instrument for reducing the risk of convictions resting on factual error," *In Re Winship,* 397 U.S. 358, 363 (1970); and is necessary to reduce the same risk in the infliction of the extreme penalty of death, as to which any avoidable error would be intolerable. See *Gardner v. Florida, supra.*

> "There is always in litigation a margin of error, representing error in factfinding, which both parties must take into account. Where one party has at stake an interest of transcending value. . .this margin of error is reduced as to him by the process of placing on the other party the burden (of proof). . . beyond a reasonable doubt."

Speiser v. Randall, 357 U.S. 513, 525-26 (1958).

It can hardly be denied that Coleman has at stake an interest of transcendent value. Nevertheless, Montana has decreed that *he* must bear the burden of persuasion of the facts on which his life depends, and must die even though it is clear that the Montana mitigating circumstances exists that Coleman had no prior criminal record and that this warrants his salvation even under the narrow calculus of the Montana statute. This Court should not permit such a sentencing system to stand.

Coleman further questions the different standards fixed by statute as to the aggravating and mitigating circumstances, as the sentencing judge is only required to "find" an aggravating

circumstance, while a mitigating circumstance must be found "sufficiently substantial" before it may save his life. As this statute was then applied to Coleman he was faced with a sentencing judge who found that his arrest-free, conviction-free record was just a "technical" mitigating circumstance and one not worthy to be found as "sufficiently substantial."

One further point bears noting here. Other states' statutes require a "weighing" of aggravating and mitigating circumstances, and many decisions discuss whether the mitigating circumstances "outweigh" the aggravating circumstances. Although the Montana statute does not so provide, the sentencing judge and the Montana Supreme Court have used this language erroneously. The statutory unequal and discretion limiting standards in Montana are simply to "find" an aggravating factor, which then mandates that a death penalty "shall" be imposed, except and only if a mitigating factor is found "sufficiently substantial" to call for leniency.

6. WHETHER THE MONTANA COURTS PROPERLY CONSIDERED SIMILAR CASES?

The lower court failed to promulgate rules to consider similar cases, refused to allow Coleman to fairly argue similar cases and failed to consider similar cases in upholding Coleman's death sentence.

46-18-310, MCA 1979, provides in Part:

> "With regard to the sentence, the court shall determine:
> (3) Whether the sentence of death is excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant. The court shall include in its decision a reference to those similar cases it took into consideration."

46-18-308, MCA 1979, provides in part as to the automatic review of any sentence of death by the Montana Supreme Court:

> "The review by the Supreme Court. . .shall be heard in accordance with rules promulgated by the Supreme Court."

No such rules have been promulgated to date by the Supreme Court despite Coleman's request therefor during his appeal.

The first *Coleman* decision said, 579 P.2d 732 at p. 742:

> "To have a constitutionally valid death penalty, the United States Supreme Court has established certain necessary procedures. See: Gregg v. Georgia (1976), 428 U.S. 153, 96 S.CT. 2909, 49 L.Ed.2d 859; Proffitt v. Florida (1976), 428 U.S. 242, 96 S.Ct. 2960, 49 L.Ed.2d 913; Jurek v. Texas (1976), 428 U.S. 262, 96 S.Ct. 2950, 49 L.Ed.2d 929."

Gregg holds that under that state's procedure for expedited review, the Georgia Supreme Court must consider whether "the sentence of death is excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant." An affirmance of the death sentence must be accompanied by a reference to similar crimes that the Supreme Court has taken into consideration.

Gregg notes that the Georgia Supreme Court's review of each sentence to determine whether it is proportionate to other sentences for similar crimes is intended to prevent caprice in this inflection of the penalty and that "if a time comes when juries generally do not impose the death sentence in a certain kind of murder case" the court said, the appellate review procedures assure that no defendant convicted of such a crime will suffer a sentence of death.

Proffitt states:

> "Under Florida's capital sentencing procedures, in sum, trial judges. . .decisions are reviewed to insure that they are consistent with other sentences imposed in similar circumstances."

Jurek approved that state's procedure for expedited review by the Texas Court of Criminal Appeals.

In its decision affirming this second hanging sentence imposed upon Coleman, the Montana Supreme Court made its only findings and rules as shown at 605 P.2d 1018 (App. p. 63).

So the standards of review, as set forth for the first time in the *Coleman* decision, and without allowing Coleman to be heard thereon, provide the Montana Supreme Court's determination that the court "need not examine *every* similar case whether appealed or not, rather we need only examine those cases where

after conviction the death penalty could have been or was imposed that have reached our attention through the appellate process"; that, "because it is extremely rare a defendant would acquiesce in a death sentence, we believe this procedure will insure we have a more than adequate representation of 'similar cases' "; and that "we will thus consider cases where the defendant has been charged with kidnapping and murder of the victim of the kidnapping and where the defendant has been charged with aggravated kidnapping where the victim has been killed."

Then the decision discusses as similar cases the two men convicted in *State v. Rhodes,* the defendant in *State v. McKenzie,* and the case of *State v. Robert Dennis Nank,* and based on these cases only finds that Coleman's death sentence "was not excessive or disproportionate to the penalty imposed in similar cases in this state."

An examination of *Rhodes* discloses:

> "The two defendants, Shields and Rhodes, had escaped from jail in Mountain Home, Idaho where they overpowered the sheriff at 9:15 a.m. on September 17, 1972 taking with them two revolvers, a .38 caliber S & W and a .357 S & W. They also took a police officer as hostage. On that same day the two defendants took by force an automobile belonging to Edward and Margaret Uffelman of Dayville, Oregon. . .
>
> Shields and Rhodes were charged in Federal Court with kidnapping in respect to their abduction of hostage batton, they plead guilty and were each sentenced to 10 years.
>
> Shields and Rhodes had each been convicted of felonies previously; Shields of burglary and Rhodes of manslaughter. The evidence in this case is clear, convincing and beyond any doubt of a series of crimes and of a vicious, wanton, cold-blooded murder of Don Kalberg."

Coleman's record of no prior convictions, and no prior arrests for any crimes of any nature whatsoever is not similar to Shields and Rhodes.

Then actually, Rhodes and Shields justify the reversal of Coleman's hanging sentence. They were sentenced to hang under an unconstitutional statute, as held by the Montana Supreme Court, and their sentences were modified by the Montana Supreme Court to "sentences on each of the defendants of imprisonment in the Montana State Prison for the term of his natural life." (524 P.2d 1101).

Then the *Coleman* decision compared *McKenzie* where that court held, at 557 P.2d, p. 1033:

> "Judge Nelson, prior to sentencing, had a thorough pre-sentence report compiled on defendant which indicated this was not his first encounter with the law. Defendant was a former parolee at the time of the murder having been convicted in 1970 of the crime of aggravated assault on another woman. That woman was found brutally beaten, clad only in a blouse crawling alongside a road. Defendant received a three year sentence for that crime, was paroled after some six months in the prison, but returned to prison after numerous parole violations. In 1972 he was again paroled as safe to be at large in society. That parole had expired three months before the present crime. The findings and conclusions found no circumstances that mitigated defendant's conduct. In addition, Judge Nelson found defendant should never be allowed to be free in and endanger society again."

This certainly does not compare to Coleman's conviction-free arrest-free record and the favorable reports on Coleman's prior life shown in his presentence report.

The third case compared by the Montana Supreme Court, that of *Nank*, seems incredible. Based on the jury's verdict as to Coleman, both men were guilty of exactly the same crimes. However, here again, Nank had a record of previous felony conviction, and Coleman had none. As to the particular facts of the crime involved, Nank's own sworn testimony showed that he initiated the acts that led to the victim's kidnapping when he alone turned off the key to the car while she was driving down the road and

steered the car to the side of the road, that Nank first attempted to have intercourse with her, and that Nank was the one who completed this crime by holding the victim's head under water until she drowned. The only other difference between the two cases is that Nank plead guilty and agreed to testify against Coleman, whereas Coleman proclaimed his innocence and exercised his constitutional right to a jury verdict thereon. So the comparison is between Nank, a prior felon, a confessed kidnapper, raper, and murderer, a white man, who received a 100 year sentence, eligible for parole in 12 years, with Coleman, who has no previous criminal record, no previous arrest record, a black man, whose sentence to hang was approved by the court.

One difference strenuously objected to by Coleman below is that Nank was permitted to plea bargain for his 100 year sentence and when Coleman, in writing, offered to plead guilty if he would receive the same sentence as Nank, the prosecutors refused to plea bargain at all and Coleman was forced to trial. It is Coleman's position that the sole difference is the color of his skin when his crime involves the rape, kidnapping and killing of a white girl and that this unconstitutionally violates his right to equal protection. "Similarly situated defendants should be afforded equal plea agreement opportunities." A.B.A. Standards for Criminal Justice, Standards Relating To The Prosecution and the Defense Function, approved draft (1971) at 102.

Even under the limited standards set by the Montana Supreme Court in *Coleman*, there are other cases that should have been considered. One strikingly similar case is *Andra Stewart*, who was represented by Coleman's present counsel. He was convicted of aggravated kidnapping which led to the death of that victim. As reported at 573 P.2d 1138, Stewart was first sentenced to 100 years, reversed because of erroneous procedures following by the sentencing judge, and he was then sentenced to serve 30 years and was released on parole after six years.

Then *Robert Close's* death sentence on his conviction of the exact same crime as Coleman's was on appeal when the Montana Supreme Court first reversed Coleman's first death sentence as unconstitutional. His appeal was then dismissed and he was sentenced to the State Prison.

A list of other similar cases appealed to the Montana Supreme Court and some on file in Yellowstone County, Montana, which list and with all facts set forth here was also furnished to the Montana Supreme Court at the time of oral argument on rehearing and which was not discussed by that Court, is at App. p. 154.

One possible method to compare sentences would be as was proposed by Coleman in a motion to the Montana Supreme Court prior to its decision on his second appeal. That motion asked first that the state provide a list of all persons then serving in the Montana State Prison, whose crimes involved the death of their victims. This list was furnished by the State. App. p. 147. The motion asked that Coleman's counsel be permitted to examine the presentence report as to each one of these defendants, and there abstract the relevant facts involved and then argue as to similarity. Due process requires that Coleman's counsel have an opportunity to obtain facts as to similar cases, and have a hearing where he can present his argument thereon to the court, prior to the court's decision as to similar cases.

It is submitted that any meaningful comparison would at a minimum show the previous felony records of all such defendants, and would show their race. There is no way that this can probably be done unless access to the presentence reports would be made available. A copy of the list of persons furnished by the State, the 44 names referred to above, was sent to Dewey Coleman, to determine their race. Of the 36 persons known to him, not one was black. The only name on this list known to Coleman or to his counsel who was also black is Andra Stewart.

After having granted Coleman's Petition for Rehearing and having stated in its second opinion, 605 P2d 122 (App. p.66) that:

> "If defendant or defendant's counsel should wish, he may submit a list of any other similar Montana cases that he may request us to review for comparative purposes, within the time provided for and as a part of any petition for rehearing in this cause."

and after Coleman then submitted such information, as set forth above, the Montana Supreme Court then not only refused to consider the same, but in their opinion on rehearing then erroneously held that their only duty on review of a capital case was to affirm the discretion of the sentencing trial judge by holding:

> "Further we see no reason to change our position with respect to the similar cases that we looked at in order to determine whether or not the death sentence in Coleman's case was disproportionate. We take our duty to be, in connection with whether a death sentence is disproportionate, that we should review the circumstances of the crime of which the defendant is accused, and in the light of those circumstances, the judgment and the sentence thereupon imposed; and, examine cases involving similar crimes, all for a single purpose, to make certain that as far as the defendant in this case, Coleman, is concerned, there has been no discriminatory action on the part of the sentencing judge, no abuse of discretion by the sentencing judge, and that the sentencing judge has considered and applied fairly and without discrimination the applicable law. We find this to be true in this case. It should be understood that in the final analysis, the imposition of sentence is not one that this Court must undertake. That matter is still reserved under our statutes to the District Courts. There is a discretion vested in the District Court in capital cases as to whether the death penalty should be imposed. Once that discretion has been exercised, and if we find that it has been exercised fairly, indiscriminately and in accordance with applicable statutes, then it must be upheld. The search for disproportionateness involves elements that consider the gravity of the crime, the brutality with which it may have been committed and the factors, if any, which lead to a call for leniency. We look for the evenhanded application of death sentences without regard to sex, color, creed, or race, or any other discriminating consideration. When we find that this has occurred, as we find here, our course under the law is to uphold the decision of the District Court.

This does not comport with every decision of the United States Supreme Court as to the requirements of appellate review of death sentences or for that matter with the Montana statute.

Justice Shea's dissent in the second appeal sets forth certain appropriate views as to the total actions taken by the sentencing judge. 605 P.2d 1022. (Appendix p. 67).

The ironical similar case never discussed is that of the last man hung in Montana on September 10, 1943, a black named Phillip Coleman. Both Colemans were born in Missouri and their crimes were committed at the ages of 25 and 27. In the first Coleman case, Louis Brown confessed that he was an accomplice to the two murders and that Coleman was responsible, was sentenced to 100 years and paroled in 15 years. Robert Nank, testifying against Dewey Coleman, will be eligible for parole in 12 years on his 100 year sentence. Both Colemans believed that racial prejudice was involved in their death sentences, Phillip Coleman stating, "If I was white and had some money, I could beat this case." The basic dissimilarity is that Phillip Coleman confessed to eight murders just before he was hanged and Dewey Coleman steadfastly maintains his innocence and has no criminal record.

7. WHETHER COLEMAN WAS UNCONSTITUTIONALLY DEPRIVED OF HIS RIGHT TO PRESENT ARGUMENT AS TO HIS DEATH SENTENCE."

Coleman's counsel was not permitted to present oral argument to the sentencing court as to the sentences he might receive, including his death sentence, at a sentencing hearing and prior to the time that the court made its "Findings, Conclusions, Judgment and Order." Before the start of the July 10, 1978 sentencing hearing, the judge delivered to Coleman's counsel a copy of these, setting forth his justification as to why Coleman should hang. Although on request the court then permitted Coleman's counsel to speak on this, it is clear this was after the decision had been fully made.

On denying a petition for rehearing, the sentencing court acknowledged that his findings and conclusions had been prepared prior to the hearing and justified the actions taken by stating that counsel did not raise anything new or that had not been considered except *Lockett v. Ohio*, and then distinguished this case.

This violates Coleman's constitutional right to due process and specifically the Montana Statute, 45-18-302, MCA 1979, requiring that "the defendant or his counsel shall be permitted to present argument for or against sentence of death."

8. WHETHER COLEMAN'S JURY WAS UNCONSTITUTIONALLY INSTRUCTED AS TO THE CRIMINAL INTENT THE STATE HAS THE BURDEN OF PROVING BEYOND A REASONABLE DOUBT?

The Montana Court approved an instruction which told the jury it could convict Coleman on proof of a homicide alone as the jury could infer from this the only other fact necessary, Coleman's criminal intent. The Court held at 605 P2d 1052 (App. p. 124) that:

> "The instruction to which Coleman objects on the basis of *Sandstrom* is the trial court's instruction no. 22 as follows:
>
> 'If you find that the defendant Dewey Eugene Coleman committed a homicide and no circumstances of mitigation, excuse or justification appear, then you may infer that the homicide was committed knowingly or purposely."
>
> The *Coleman* instruction refers to an inference of fact, a deduction that logically could be inferred by the jury under proof of the circumstances stated. The possible inference, by its terms is not in itself unreasonable."

In *Sandstrom v. Montana*, ___ U.S. ___, at p.___, this Court said that determining whether the state has been relieved of its burden of proof, "requires careful attention to the words actually spoken to the jury. . .for whether a defendant has been accorded his constitutional rights depends upon the way in which a reasonable jury could have interpreted the instruction."

Although couched as an inference Coleman's jury was not ever instructed as to the definition of an inference (the Montana Court's statutory definition of an inference as "indirect evidence as per 605 P.2d 1053, App. p. 126, was not in any instruction), or that the jury could disregard it or that even with this inference

that the jury was still required to find that Coleman acted "knowingly or purposely" beyond a reasonable doubt. The attempt below to do this by reference to a "circumstantial evidence" instruction given, 605 P.2d 1053, (App. p. 126), is just not appropriate. And the concluding statement on this issue below that "such inference standing alone would be insufficient unless it was inconsistent with any other hypothesis than guilt" 605 P.2d 1053 (App. p. 127), was not the law given this jury. This instruction was more critical than the one held unconstitutional in *Sandstrom* as this jury was told that all it had to do to convict was to "find that the defendant. . .committed a homicide."

Fundamental constitutional due process requires that the state must satisfy its burden of proof to the jury to find criminal intent in a homicide case, the specific intent to kill, beyond a reasonable doubt.

This instruction to convict then also was supported by the statutory definitions of "purposely" and "knowingly" which did not require the jury to find that Coleman had criminal intent, that Coleman had the specific intent to kill this victim, or even that Coleman had the purpose to kill or the knowledge that his act would kill.

In adopting its definitions on these terms, Montana did not follow the definitions from the Model Penal Code or from the Illinois or New York Penal Codes despite the statements by the Criminal Law Commission to this effect, and instead watered down these definitions to make it easier for a jury to find criminal intent, purpose or knowledge, and then compounded this with the instruction cited above.

Coleman's objections below to the Montana definition of "knowingly" were correctly summed up by the Montana Court at 605 P.2d 1055 (App. p. 128):

> "In trial court's instruction no. 26, the jury was told:
>
> ' "Knowingly". A person acts knowingly with respect to conduct or to a circumstance described by a statute defining an offense when he is aware of his conduct or that the circumstance exists. When knowledge of the existence of a particular fact is an element of an offense, such knowledge is established if a person is aware of a high probability of its existence. Equivalent terms such as "knowing" or "with knowledge" have the same meaning.
>
> "The objections to this instruction on rehearing are: (1) it violates the rule against reasonable doubt because it requires only a 'high probability of its existence;' (2) it is in effect an exclusive presumption in that the element is established if the jury finds a high probability of its existence; and (3) 'high probability' does not have that quality which would enable a jury to convict."

before that Court erroneously overruled this objection by reading into and adding the reasonable doubt requirement, which just is not present in this statute or the instruction.

The homicide defendant in Montana can be convicted without this Court's requirements noted in *U.S. v. Bailey*, ___ U.S. ___, 62 L.ed.2d 575, 100 S.Ct. ___, that:

> "Criminal liability is normally based upon the concurrence of two factors, 'an evil-meaning mind (and) an evil-doing hand. . .'
> Morissette v. United States, supra, at 251, 96 L.Ed. 288, 72 S.Ct. 240.
>
> . . .
>
> As we pointed out in United States v. United States Gypsum Co., 438 U.S. 422, 445, 57 L.Ed.2d 854, 98 S.Ct. 2864 (1978), a person who causes a particular result is said to act purposefully if ' "he consciously desires that result, whatever the likelihood of that result happening from his conduct(.)" ' while he is said to act knowingly if he is aware ' "that the result is practically certain to follow from his conduct, whatever his desire may be as to that result." '
>
> . . .
>
> "In certain narrow classes of crimes, however, heightened culpability has been thought to merit special attention. Thus, the statutory and common law of homicide often distinguishes, either in setting the 'degree' of the crime or in imposing punishment,

> between a person who knows that another person will be killed as the result of his conduct and a person who acts with the specific purpose of taking another's life. See LaFave & Scott, supra, at 196-197."

Coleman's jury was never instructed that they must find beyond a reasonable doubt that he knew that another person would be killed as the result of his conduct and that he acted with the specific purpose of taking another's life.

CONCLUSION

Coleman requests that this petition for a writ of certiorari be granted.

Respectfully submitted,

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ATTORNEYS FOR PETITIONER

April 2, 1980

I certify that this Petition for Certiorari was served by mail on April 2, 1980 on Michael Greely, Montana Attorney General, Capitol, Helena, Montana 59601, and John Forsythe, Rosebud County Attorney, Courthouse, Forsyth, Montana 59327.

/s/ Charles F. Moses

CHARLES F. MOSES